

HONORABLE MARSHA J. PECHMAN

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

IN RE WASHINGTON MUTUAL
MORTGAGE BACKED SECURITIES
LITIGATION

This Document Relates to: ALL CASES

Master Case No. 2:09-cv-00037-MJP

**PLAINTIFFS' MOTION TO SEAL
CERTAIN PORTIONS OF EXHIBIT H
TO THE DECLARATION OF JEE
YOUNG YOU IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

**NOTE ON MOTION CALENDAR:
July 29, 2011**

I. INTRODUCTION

Lead Plaintiffs Doral Bank Puerto Rico ("Doral Bank") and Policemen's Annuity and Benefit Fund of the City of Chicago ("Chicago PABF") and Plaintiff Boilermakers National Annuity Trust ("Boilermakers") (collectively, "Plaintiffs") file this Motion to Seal certain portions of excerpts from the Deposition of Marangal Domingo ("Domingo") which has been submitted as Exhibit H to the Declaration of Jee Young You in Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification. (Dkt. No. 250). Plaintiffs respectfully request that the Court issue an Order sealing marked excerpts of Exhibit H and allow the public filing of the proposed redacted version of Exhibit H, which is attached as

Exhibit A to the Declaration of Enrique Ubarri. (“Ubarri Declaration”). The proposed redactions contain proprietary information that is subject to protection under the Stipulated Protective Order the Court entered in this case (Dkt. No. 213) (the “Protective Order”) and concerns ongoing business of Doral Bank, the disclosure of which could result in the annoyance, embarrassment, oppression, or undue burden or expense to Doral Bank.

II. STATEMENT OF FACTS

On March 11, 2011, Plaintiffs submitted their motion seeking to certify a class of purchasers of certain WaMu mortgage-backed securities. On June 22, 2011, in connection with the filing of their opposition to Plaintiffs’ motion, Defendants moved to seal portions of their memorandum of points and authorities in support of their opposition to plaintiffs’ motion for class certification, the expert report of Professor Christopher M. James and certain exhibits in support of their opposition. Among the exhibits that Defendants sought to file under seal were certain excerpts from the deposition of Marangal Domingo, a Rule 30(b)(6) witness testifying on behalf of Plaintiff Doral Bank. The excerpts (“Exhibit H”) included confidential information concerning Doral Bank’s business practices and investment procedures. See Ex. H at 88-89, 190-91, 218-19, 224. Pursuant to the Protective Order, and as made evident by the notation on the top of each page of Exhibit H, the Domingo deposition transcript was marked confidential by Plaintiffs. Defendants appropriately, in Plaintiffs’ view, filed such excerpts under seal. However, in support of their motion to seal Defendants did not fully explain the reasons sealing Exhibit H was appropriate. Defendants argued only that that the exhibits sought to be filed under seal, including Exhibit H, were protected from disclosure by federal law, including the Graham-Leach-Bliley Act, 15 U.S.C. § 6801, et seq. However, on July 8, 2011, this Court ruled that Defendants had failed to rebut the presumption favoring access to judicial documents and had not shown how the Graham-Leach-Bliley Act applied to protect Exhibit H from disclosure. *In re Washington Mutual Mortgage-Backed Securities Litigation*, Civ. No. 09-0037-MJP, Dkt. No. 266

(W.D.Wa July 8, 2011) (the “Order”). As a result, the Court ordered that the exhibits be publicly filed.

Plaintiffs bring this motion to maintain certain portions of Exhibit H under seal, not because they are protected by the Graham-Leach-Bliley Act, but because they contain confidential personal information and trade secrets about Doral Bank and its employees, and there are compelling reasons to keep that information sealed.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

The Court has authority to seal documents, or portions of documents, that contain confidential or highly sensitive information. The Protective Order and LR 5(g)(3) provide that a party must obtain the Court’s authority to seal documents by filing a motion to seal. This Court has previously ruled that it will not grant a motion to seal made in connection with a motion for class certification absent compelling reasons. See Order Granting in Part and Denying in Part Motion to Seal, *Kelley v. Microsoft Corp.*, No. cv-00475-MJP, Dkt. 129.

A “compelling reasons” standard applies to the sealing of most judicial records. *Pintos v. Pac. Creditors Assoc.*, 605 F.3d 665, 678 (2010) (citing *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003)). This standard derives from the common law right “to inspect and copy public records and documents, including judicial records and documents.” *Id.* (quoting *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted)). To limit this common law right of access, a party seeking to seal judicial records must show that “compelling reasons supported by specific factual findings ... outweigh the general history of access and the public policies favoring disclosure.” *Id.* (citing *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted)).

Under the “compelling reasons” standard, a district court must weigh “relevant factors,” base its decision “on a compelling reason,” and “articulate the factual basis for its ruling, without relying on hypothesis or conjecture.” *Id.* at 679 (quoting *Hagestad v.*

1 *Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). Courts in the Ninth Circuit have considered
 2 the following factors in determining whether compelling reasons exist to warrant sealing
 3 records: (1) the public's interest in understanding the judicial process; (2) whether disclosure
 4 of the material at issue could result in improper use (such as to incite scandal, libel a party, or
 5 enable infringement of a party's trade secrets); (3) the interests of the parties, and the balance
 6 of equities; and (4) the duty of the court to balance all of these competing interests and to
 7 inform the public of the basis for its decision. *See California ex rel. Lockyer v. Safeway,*
 8 *Inc.*, 355 F. Supp. 2d 1111, 1115 (C.D. Cal. 2005) (citing *Nixon v. Warner Comm'n, Inc.*,
 9 435 U.S. 589, 602-04, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); *Hagestad*, 49 F.3d at 1434;
 10 *Valley Broad. Co. v. U.S. District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986)) (finding in the
 11 context of a labor dispute that consideration of these factors as well as "the national labor
 12 policy" were relevant in evaluating a non-party's motion to seal exhibits containing personal
 13 financial information).

14 **B. Compelling Reasons Exist to Redact Portions of Exhibit H**

15 "It is well-settled that the court has the authority to shield proprietary information
 16 related to the ongoing operations of a business from public review. *Selling Source, LLC v.*
 17 *Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664 (D. Nev. Apr. 29, 2011). In *Selling*
 18 *Source*, faced with a motion to seal discovery documents and deposition transcripts that
 19 related to the Defendant's business, the court held that, "most of the material consists of
 20 detailed information regarding the parties' business operations, customer agreements,
 21 corporate structure, the details of Selling Source's customer base and how the company
 22 works with and licenses products to its customers and measures it takes to protect its
 23 intellectual property. Based on the content of this material, the parties' interest in protecting
 24 their trade secrets and proprietary business practices outweighs the general public interest in
 25 public filings." *Selling Source*, 2011 U.S. Dist. LEXIS 49664 at *5.

26 The proposed redactions of confidential information discussed in Exhibit H include
 27 testimony about Doral Bank's business practices, which constitutes proprietary information

1 that should be shielded from disclosure. This proprietary information includes Doral Bank's
 2 securitizations and investment pricing practices, asset and liability management committee
 3 processes, due diligence practices, and approval procedures. See Ex. H at 88-89, 190-91,
 4 218-19, 224. Public disclosure of this information could further subject Doral Bank to the
 5 risk that this information will be used improperly by third-party competitors.

6 **C. Sealing These Documents Will Not Hamper the Public's Understanding of the
 7 Judicial Process**

8 Moreover, other "relevant factors" warrant sealing this information. First, sealing the
 9 non-public business practices of Doral Bank will neither hamper nor threaten the public's
 10 interest in understanding the judicial process. Indeed, the other exhibits filed in this action,
 11 especially the other exhibits filed in support of Defendants' Opposition to Plaintiffs' Motion
 12 for Class Certification provide a wealth of information regarding the issues in this case and
 13 Defendants' arguments against class certification. The sealing of discrete portions of one of
 14 the many exhibits submitted in support of Defendants' opposition does not negatively impact
 15 the public's interest.

16 Continued access to the other exhibits filed in this case, including the rest of
 17 Defendants' exhibits, will ensure that the public is able to review and assess the information
 18 most relevant to this case. The public's interest in understanding the claims and defenses in
 19 this case and, ultimately, the public's interest in understanding the judicial process by which
 20 those claims and defenses will be evaluated, will not be impaired if the Court grants this
 21 motion.

22 **D. Disclosure of This Information Could Result in Improper Use**

23 Furthermore, information regarding Doral Bank's business practices and procedures
 24 could be used against Doral Bank by competitors, the potential of which should be
 25 considered in determining whether compelling reasons exist to seal documents. By bringing
 26 this motion, Plaintiffs seek to prevent the possibility of other entities misusing, manipulating,
 27 or otherwise exploiting this information to the detriment of Doral Bank.

1 **E. Neither the Parties' Interests nor a Balancing of the Equities Precludes Sealing**
2 **This Information, and The Court Must Balance These Competing Interests and**
3 **Inform the Public of the Basis for its Decision**

4 Finally, Plaintiffs' interest in protecting this information outweighs those interests of
5 the public. The information Plaintiffs seek to seal has little probative value as to the issues
6 raised in their certification motion or in Defendants' opposition, and sealing this information
7 will not impede the public's ability to independently assess the case. As previously
8 discussed, continued access to other exhibits filed in this matter, especially with regard to
9 Defendants' opposition, will ensure this interest is adequately protected.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request that the Court seal excerpts
12 on pages 88-89, 190-91, 218-19 and 224 of Exhibit H to the Declaration of Jee Young You in
13 Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification. A proposed
14 redacted version of Exhibit H is attached to the Ubarri Declaration submitted herewith.

15 **V. PROPOSED ORDER**

16 A proposed order is submitted herewith.

17 Dated: July 15, 2011
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Respectfully submitted,

TOUSLEY BRAIN STEPHENS PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record and additional persons listed below:

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